TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 575.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 17, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 9, 1887.

1 I.—*Petition. Filed October* 14, 1885.

In the Court of Claims.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY
v.
THE UNITED STATES. } No. 14701.

To the Chief Justice and Judges of the Court of Claims:

The petition of the New Orleans Pacific Railway Company respectfully represents—

On the 29th June, 1875, it was duly incorporated under the general laws of the State of Louisiana relating to corporations, and on the 19th February, 1876, the Legislature of Louisiana confirmed its charter and granted to it, *inter alia*, perpetual succession.

The New Orleans, Baton Rouge and Vicksburg Railroad Company is a corporation created and existing under and by virtue of a special act of the Legislature of the State of Louisiana approved December 30th, 1869, and is the company mentioned in section 22 of the act of Congress approved March 3d, 1871.

Your petitioner states that on the 11th day of November, 1871, the said New Orleans, Baton Rouge and Vicksburg Railroad Company filed in the Department of the Interior a map of the general route of its road from Baton Rouge to Shreveport, Louisiana, and on the 13th day of February, 1873, it filed a like map in said department, showing the general route of its road from New Orleans to

2 Baton Rouge. In 1871 and 1873 the lands along said general route, within the grant of March 3, 1871, were withdrawn from sale and entry by order of the said department.

On the fifth of January, 1881, the said New Orleans, Baton Rouge and Vicksburg Railroad Company conveyed to your petitioner for a good and valuable consideration all the right, title, and interest of the said New Orleans, Baton Rouge and Vicksburg Railroad Company in and to the said grant of public lands, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, which conveyance was duly accepted by your petitioner February 3d, 1881; the conveyance and acceptance thereof were duly filed with the Secretary of the Interior on the 17th February, 1881, and the president of the New Orleans, Baton Rouge and Vicksburg Railroad Company was informed officially by the Commissioner of the General Land Office on the 17th and 26th days of February, 1881, that such transfer fully vested the New Orleans Pacific Railway Company with all the right, title, and interest which the former company had in and to said grant.

After the date of said conveyance your petitioner constructed 260 miles of railroad from Shreveport, by way of Alexandria and West Baton Rouge, to White Castle, all in the State of Louisiana, within the limits of the lands withdrawn for the New Orleans, Baton Rouge and

Vicksburg Railroad Company, and substantially upon the course, direction, and general route of the road filed by said company. The line from White Castle to New Orleans—68 miles in length—owned and operated by your petitioner, was acquired by purchase, and repaired and built or rebuilt by it.

On the 13th March, 1883, the Secretary of the Interior
3 transmitted to the President of the United States the reports in writing of Mr. Thomas Hassard, commissioner, duly appointed by said president to examine said 328 miles, and recommended that said 328 miles, except the 68 miles between White Castle and New Orleans, be accepted, and that patents for such lands as may have been earned by the construction be issued to your petitioner. The president, on the 16th day of March, 1883, approved in writing of this recommendation, and on the 3d March, 1885, patents were issued to your petitioner for 679,287.64 acres of land in the State of Louisiana, as earned by your petitioner.

Before issuing such patents, the Secretary of the Interior exacted from your petitioner, without warrant of law, the sum of fourteen thousand seven hundred and thirteen dollars and sixty-three cents, alleging the same to be due for the costs of surveying, selecting, and conveying said lands, and this although the costs of such surveying had been incurred and expended by the United States prior to March 3d, 1871. Your petitioner denied the right of the United States to this sum, and paid the same under protest. A copy of the certificate of deposit of said money is hereto annexed and marked Exhibit A, and a copy of the said protest is hereto annexed, marked Exhibit B.

Your petitioner further sets forth that no action has been had upon this claim by Congress or by any of the departments; that no assignment or transfer of said claim has been made; that your petitioner is justly entitled to the amount herein claimed, after allowing all just credits and offsets, and that your petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

4 Wherefore your petitioner prays judgment in the sum of fourteen thousand seven hundred and thirteen dollars and sixty-three cents.

E. B. WHEELOCK, *President.*

JOHN S. BLAIR, *Attorney.*
DILLON & SWAYNE, *Of Counsel.*

STATE OF NEW YORK,
City and County of New York, } ss:

E. B. Wheelock, being duly sworn, saith that he is the president of the plaintiff corporation, and, to the best of his information and belief, the statements contained in the foregoing petition are just and true.

E. B. WHEELOCK.

Sworn and subscribed before me this 13th day of October, A. D. 1885.

[SEAL.] W. W. COTTON,
Notary Public, Kings Co.

Certificate filed in New York Co.

EXHIBIT A.

(Form 1—National banks.)

The National Bank of the Republic of Washington.

(No. 265.) WASHINGTON, D. C., *M'ch* 3, 1885.

I certify that New Orleans Pac. Railway Company has this day deposited to the credit of the Treasurer of the United States fourteen thousand seven hundred and thirteen $\frac{63}{100}$ dollars on account of to pay costs of survey and office work on 679,287.64 acres of land selected by said company in Louisiana, under the act Mch 3d, 1871, for which I have signed triplicate receipts.

CHAS. S. BRADLEY, *Cashier.*

$14,713.63.

EXHIBIT B.

NEW YORK, *March* 3, 1885.

To the Treasurer of the United States, Washington, D. C.

DEAR SIR: The New Orleans Pacific Railway Company has the honor to inclose the original certificate of the National Bank of the Republic of Washington, reading as follows:

"No. 265. WASHINGTON, D. C., *M'ch* 3, 1885.

"I certify that the New Orleans Pacific Railway Co. has this day deposited to the credit of the Treasurer of the United States fourteen thousand seven hundred and thirteen $\frac{63}{100}$ dollars to pay costs of survey and office work on 679,287.64 acres of land selected by said company in Louisiana, under the act of M'ch 3d, 1871, for which I have signed triplicate receipts.

"CHAS. S. BRADLEY, *Cashier.*"

The company begs to add that it is the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company mentioned in the 22d section of the act of Congress of March 3, 1871, chartering the Texas and Pacific Railroad; that it constructed the line of road therein mentioned, and that the President of the United States, under section 18 of said act, appointed commissioners to examine the said road, who reported that the company had fully completed the same as provided in the 22d section of said act, and he thereupon directed the Secretary of the Interior to issue patents to the said company for the lands to which it became thereby entitled under the act. When this company asked for the issue of
6 patents the honorable the Secretary of the Interior refused to issue the same until this company should pay for the costs of

the survey and office work, which, on the 679,287.64 acres of land, he stated to be the sum mentioned in the certificate, to wit, $14,713.63, and required as a condition precedent to any issue of patents that the company make a deposit of that amount in a depository of the United States. Under this compulsory requirement and under protest the company made such deposit, and, pursuant to law, the company herewith forwards the original certificate thereof and pays the same under protest, it claiming that there is no act of Congress applicable to this company requiring it to make this payment as a condition precedent to obtaining patents for the lands. Kindly acknowledge the receipt of this letter and inclosure to Messrs. Dillon and N. Swayne, 195 Broadway, New York city, and oblige,

Yours, respectfully, E. B. WHEELOCK,
Pres't New Orleans Pacific Railway Company.

DILLON & SWAYNE,
Of Counsel.

7 II.—*Motion of Claimant for Leave to Amend Petition. Filed October* 29, 1885.

Now comes the claimant, by its attorney, and moves the court for leave to amend its petition by striking out from line sixteen, page three, the words "selecting and conveying."

JOHN S. BLAIR,
Attorney for Claimant.

Allowed without reprinting.
Oct. 30, 1885.

C. C. NOTT, *Judge.*

8 III.—*Demurrer. Filed November* 10, 1885.

And now come the said defendants, by their attorney general, and demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitue a cause of action.

ROBERT A. HOWARD,
Ass't Att'y General.

9 IV.—*Opinion of the Court. June* 1, 1886.

Opinion.

SCOFIELD, J., delivered the opinion of the court.

March 3, 1871, Congress passed the following act:

That the New Orleans, Baton Rouge and Vicksburg Railroad Company shall have * * * and in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of

public lands per mile in the State of Louisiana as are by this act granted in the State of California to said Texas Pacific Railroad Company: * * * Provided, That said company shall complete the whole of said road within five years from the passage of this act. (16 Stat., 579).

Nothing was done under this act by the company therein named, except to file in the Interior Department a map of the general route of its contemplated road; but in February, 1881, it sold and transferred all its rights to the claimant. Soon after the transfer the claimant began the construction of the road, and having within the next two years completed 260 miles, applied to the Secretary of the Interior for patents. The patents were made out, but before delivery the Secretary required the claimant to pay the cost of survey, amounting to $14,713.63, which requirement was complied with under protest.

This suit is brought to recover back the sum so paid.

In this transaction the Secretary followed the provision of the act of July 31, 1876 (19 Stat., 121), which is as follows:

And provided further, That before any land granted to any railroad by the United States shall be conveyed to such company, or to any persons entitled thereto, under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying the same by the said company or persons in interest.

At the time this act was passed neither the claimant nor its assignor had acquired any legal or even equitable right to claim the land. The five years within which the road should have been completed in order to secure the grant had elapsed and nearly five months in addition, but the work of construction had not been even begun. Four and a half years more were allowed to pass before anything was done.

Congress was therefore at liberty at the time this act was passed to withdraw the offer or grant altogether, or suffering it to remain, impose upon it any new conditions it saw fit.

Does the act of 1876 impose upon this particular grant a new condition?

The language of the act is very comprehensive. Beyond all doubt it embraced this grant, "unless the company is exempted by law from the payment of such cost."

It is conceded that there is no express exemption, but it is contended that an exemption grows out of the fact that no such condition is imposed in the original act, by which act, it is alleged, the rights of the parties became fixed. There would be great force in this argument if the company had earned the grant by complying with the condition upon which it was made. If, as we have stated, Congress had power, in 1876, to withdraw the grant altogether, by reason of the company's failure to undertake the construction of the road within the time limited by the act, certainly it had power to impose new terms upon its continuance.

It was ten years after the conditional grant had been made, five

years after the time limited for the completion of the road had expired, and four and a half years after a new condition had been imposed by the act of 1876, that the claimant, with a full knowledge of this act, as we are bound to presume, bought out the original grantee and began the work.

It was then too late to avoid the effect of intermediate legislation.

The demurrer is sustained, with leave to the claimant to amend the petition within the present week.

If no amendment is offered within said time judgment will be entered dismissing the petition.

NOTT, J., was not present at the trial, and took no part in the decision.

10 V.—*Order of the Court Sustaining the Demurrer with Leave to Claimant to Amend its Pleadings.*

JUNE 1, 1886.

At a Court of Claims held in the city of Washington on the first day of June, 1886, it was ordered in the aforesaid cause that the demurrer to the petition be sustained with leave to the claimant to amend its pleadings within the present week, and that unless claimant so amend judgment be entered for the defendants.

11 VI.—*Judgment for the Defendants.*

At a Court of Claims held in the city of Washington on the 7th day of June, 1886, in the cause aforesaid, the claimant having failed to plead further, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, The New Orleans Pacific Railway Company, be dismissed.

12 VII.—*Application of Claimant for Allowance of Appeal and Allowance of Same.*

THE NEW ORLEANS PACIFIC RAILWAY COMPANY
vs.
THE UNITED STATES. } No. 14701.

Now comes the plaintiff, by its attorney, and prays the court for the allowance of an appeal from the judgment entered June 7, 1886, dismissing the petition, to the Supreme Court of the United States.

JOHN S. BLAIR,
Att'y for Plaintiff.

Filed June 9, 1886.

AT CHAMBERS.

Allowed June 9, 1886.

WILLIAM A. RICHARDSON,
Chief Justice.

13 In the Court of Claims.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY
versus
THE UNITED STATES. } No. 14701.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the aforesaid cause, of the opinion of the court, of the order sustaining the demurrer of the defendants, of the final judgment of the court, of the application of the claimant for the allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this — day of ——, A. D. 1886.

[Seal of Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: No. 575. Court of Claims. The New Orleans Pacific Railway Company, appellant, *vs.* The United States. Filed June 17, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 575.

THE NEW ORLEANS PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

JOHN S. BLAIR,
JOHN F. DILLON,
WAGER SWAYNE,
Attorneys for Appellant.

Judd & Detweiler, Printers.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 575.

THE NEW ORLEANS PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

This case was tried below on demurrer. The demurrer was sustained, and, plaintiff failing to amend the petition, the judgment of the court was that the petition should be dismissed. The case is fully set forth in the petition below.

ASSIGNMENT OF ERRORS.

The court below erred in sustaining the demurrer and in dismissing the petition.

The question presented by the petition and demurrer is whether the Secretary of the Interior rightfully demanded from the plaintiff the cost of surveying lands that had been granted to it by the act of March 3, 1871, such cost having been incurred and paid prior to the grant.

The proviso to the act of July 31, 1876 (19 St., 121), is as follows:

> "*And provided further*, That before any land granted to any railroad company by the United States shall be conveyed to such company or any persons entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest."

So much of the act of March 3, 1871, as is material is as follows:

> SEC. 22. "There is hereby granted to said company [The New Orleans, Baton Rouge and Vicksburg Railway Company], its successors and assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by this act granted in the State of California to said Texas Pacific Railroad Company, and said lands shall be withdrawn from market, selected, and patents issued therefor and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California: *Provided*, That said company shall complete the whole of said road within five years from the passage of this act." (16 St., 579.)
>
> SEC. 9. "There is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of * * * ten alternate sections of land per mile on each side of said railroad in California." (16 St., 576.)
>
> SEC. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first-class road in all its appointments it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said

company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company within two years after the passage of this act shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories and twenty miles within the State of California to be withdrawn from pre-emption, private entry, and sale. (16 St., 577.)

SEC. 11. That the Texas Pacific Railroad Company shall have power and authority to issue two kinds of bonds, secured by mortgage, namely: First, construction bonds; second, land bonds. * * * Land bonds shall be secured by mortgage, first, on all or any portion of the lands hereby granted in aid of the construction of said railroad as is provided for in this act; second, on lands acquired by any arrangement or puchase or terms of consolidation with any railroad company or companies to whom grants of land may have been made, or may hereafter be made by any congressional, State, or territorial authority or who may have purchased the same previous to any such arrangement or consolidation. * * * *And provided also*, That the proceeds of the sales of the aforesaid construction and land bonds shall be applied only to the construction, operation, and equipment of contemplated railroad line: *And provided further*, That the said mortgage shall in nowise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation. (16 St., 577.)

From 1850 to 1857, inclusive, Congress made grants of the public lands to Illinois, Mississippi, Alabama, Missouri, Arkansas, Iowa, Florida, Louisiana, Wisconsin, and Minnesota for the purpose of aiding in the construction of railroads. From 1862 to 1866, inclusive, similar grants were made to Kansas, Minnesota, Wisconsin, Michigan, and Mis-

souri. Grants of public lands have been made directly to the railroad companies by the following acts:

By the act of July 1, 1862 (12 St., 489), act of July 2, 1864 (13 St., 356), to the Union Pacific, Kansas Pacific, and Denver Pacific.

Act of July 2, 1864 (13 St., 365), Northern Pacific.

Act of July 13, 1866 (14 St., 94), Placerville and Sacramento.

Act of July 25, 1866 (14 St., 239), California and Oregon Company.

Act of July 27, 1866 (14 St., 292), Atlantic and Pacific, Southern Pacific.

Act of March 3, 1869 (15 St., 324), Denver Pacific.

Act of May 4, 1870 (16 St., 94), Oregon Central R. R. Company.

Act of March 3, 1871 (16 St., 573), Texas Pacific, New Orleans, Baton Rouge and Vicksburg, and Southern Pacific.

Not one of these granting acts, whether to the States or to the companies, made any provision as to who should pay for the costs of surveying and conveying the land, nor did any contain a provision expressly exempting the railroad companies from such cost. In 1864, when the grants to the Union Pacific, Kansas Pacific, and Denver Pacific Companies were enlarged and various valuable privileges conferred on them, it was enacted that those companies should pay the costs of survey before receiving conveyances; and in 1870 it was enacted that the Northern Pacific Railroad Company should do the same.

In the case of the Union and Northern Pacific Companies the grant of lands as made in 1864 was through regions which were mostly unsurveyed and where the cost of the surveys, which were to be made for the benefit of the companies, so far as the lands granted to them were concerned, were yet to be incurred by the United States. Under those circumstances Congress, in enlarging the grant to the Union Pacific Companies and in appropriating for the costs of the

survey of lands granted to the Northern Pacific, enacted that when they received their patents they should pay the costs of such surveying. In the case at bar the surveys in Louisiana were made and paid for by the United States many years before the act of 1871, section 22, making the grant of lands was passed; and this act, as we have seen (sec. 12 quoted, *supra*), provided for the issue of patents without requiring the payment of the cost of surveying, and therefore exempting the company from the payment of such cost.

I.

The obvious and natural meaning of the proviso to the act of 1876 is that, whereas all land grants theretofore made have, in the absence of express language to the contrary, been construed to leave the United States to pay the whole cost of surveying, grants which should be made thereafter, in the absence of express words to the contrary, shall be construed to impose that cost on the companies. The practice under the granting acts had been for the Government, which from the nature of things controlled and directed the surveys, to expend the moneys appropriated for surveying, and, having done so, inasmuch as the statute was silent on the subject, to make no charge or demand therefor. It was not the purpose of the Forty-fourth Congress to restrict or limit the power of future Congresses as to the payment or demand for these costs, but merely to provide what should be the law where its successors would be silent.

To construe the proviso as relating to existing grants presents the curious feature of Congress declaring that roads which had been theretofore exempt by law from such payments should continue so, and this, furthermore, when an examination of the statute books shows that not a solitary company or State was expressly exempted by law. As was said by Mr. Justice Catron, in McEwen *vs.* Den. (24 Howard,

244), it is of the very essence of a new law that it shall apply to future cases, and such must be its construction unless the contrary clearly appears.

In the twenty per cent. cases Mr. Justice Clifford says (20 Wall., 187):

> "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to *interfere with existing contracts*, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed *expresses a contrary intention in unequivocal terms.*"

Cited with approval in Chew Heong *vs.* the U. S., 112 U. S., 559.

II.

If, as is contended by the Attorney General, it was the intention of Congress to impose upon the railroad companies a burden additional to those found in the granting acts, without the consent of the companies and without any consideration therefor, the question is presented whether such a requirement would not be a breach of contract, whether there has not been an assumption of extra-legislative powers; and at the outset it is to be observed that, as alleged in the petition, all of this grant had been surveyed at the time of the grant and all the expenses therefor had been incurred. Consequently, to our assignors, the land granted was *surveyed land*, and in the absence of express enactment no ques-

tion could arise as to whether the company should refund the money spent therefor any more than the question could be made as to whether the United States, before conveyance to the company, should be reimbursed the price paid to France for the soil.

This surveyed land was granted in 1871, and the condition precedent to the issue of the paper conveyance was the completion of a section of railroad; and the outlay necessary to complete such section, the immediate benefit to the United States in bringing railroads into their otherwise inaccessible and useless territory, and the resultant benefit to the community at large were regarded then as a sufficient and valid consideration for the grant and for the conveyances thereunder. It is contended by the Attorney General that the Forty-fourth Congress thought otherwise, and exacted a new and further consideration.

This Court has held in Union Pacific *vs.* United States (99 U. S., 700) and Chicago and Northwestern Railroad *vs.* The United States (104 U. S. 680) that the United States are as much bound by their contract as individuals.

In the two statutes passed prior to 1876 requiring the railroad companies to pay these costs the companies themselves have acquiesced. Indeed, they have gone further, and in Railway Co. *vs.* Prescott (16 Wall., 603), Same *vs.* McShane (22 Wall., 444), and Northern Pacific Railroad Company *vs.* Traill County (115 U. S., 600) have invoked that provision to aid them in resistance of the payment of taxes. Now, while the United States are bound by their contracts, and cannot without the consent of the other party change the terms, yet, like any other contractor, they may negotiate and may propose changes in the conditions, and these, when accepted by the other party, are as much a part of the contract as the original agreement. The question in the Traill County case was simply what are and what have been the contract relations between the United States and the Northern Pacific Railway Company. The real issue was whether the proviso

in the act of July 15, 1870 (16 St., 305), which imposed upon the company the cost of surveying, was a part of the contract. As both parties insisted that it was, the corporation of Traill county, like the plaintiff in Hagar *vs.* District No. 108, (111 U. S., 712), was not a party to the original contract and was in no position to involve its protection.

In the two statutes just mentioned, the acts of 1864 and 1870, the purpose of Congress was plain and the roads to be affected were specified.

Under the statute now before the Court the companies affected are not mentioned by name, and as the act of 1876 excepts those companies that are exempt by law, it is to the statutes, and to the statutes alone, that we must look for the exemption; but the court below, following the case of Traill county, makes the exception rest not upon what was to be found in the statute books in 1876, but upon what was found on the ground. If that had been the intention of Congress it would have been much more apt to have legislated concerning the railroads which at that date were uncommenced or whose limit had expired.

What was our interest in these lands, and what rights were conferred upon our assignor by the act of 1871?

"There is hereby granted" are the words used, and they are words of absolute donation. They impart an immediate transfer of interest, a grant *in presenti* and not one *in futuro*, or the promise of a grant, and when our railroad was ultimately constructed and the precise sections designated our titles *related* to the date of the grant. (Schulenberg *vs.* Harriman, 21 Wall., 44; Leavenworth, Lawrence and Galveston Railroad Company *vs.* The United States, 92 U. S., 733; Missouri, Kansas and Texas Railway Company *vs.* Kansas Pacific Railway Company, 97 U. S., 491; Railroad Company *vs.* Baldwin, 103 U. S., 426.) The act of February 2, 1887 (24 St., 391), recognizes this, for it "*confirms*" to us all the lands which it does not forfeit.

The statute not merely gave to the New Orleans, Baton

Rouge and Vicksburg Railway Company the right of immediate enjoyment, but by section 11 it expressly authorized the mortgaging of the grant to raise money to construct the road, and it is apparent from that section that the mortgage was to anticipate the construction of the road. As was said in Platt *vs.* Union Pacific R. R. Co., 99 U. S., 61, it was not intended to be available only after the company had raised all the money necessary for the work, and (as was held in that case) the hypothecation would be of the entire fee.

The petition sets forth that in 1871 and 1873 maps of the general route of the road were filed, and in accordance with section 12 of the act of March 3, 1871, the Secretary of the Interior duly withdrew from pre-emption and sale the alternate odd sections within twenty miles on each side of the general route so designated, and it is for lands so withdrawn in 1871 and 1873 that the patents were issued in 1883, and it is the cost of surveying expended prior to the grant that was exacted from us upon the issuance of the patents.

But it is urged that the five years designated in the act of March 3, 1871, had expired and no work had been done. As there was no reservation in the act of 1871 of the power "to add to, alter, amend, or repeal" the right to exact from us the costs of surveying, if any such right exists, must result from this failure. Failure on the part of the grantees to comply with the terms of the grant had been expressly provided for by section 17 as follows:

> "And upon failure to so complete it Congress may adopt such measures as it may deem necessary and proper to procure its speedy completion."

This provision in section 17 applies also to section 22. The Texas Pacific was required to be completed in ten years (section 17), and section 22 refers all the way through to the terms and conditions of the grant to the Texas Pacific, and if it had not been for the proviso at the end of section 22

the Vicksburg, Baton Rouge and New Orleans Railway Company would have had *ten* years in which to complete its road. The object of the proviso was to fix the time at *five* years. Whether or not this included the power to forfeit it certainly cannot be successfully contended that the imposition of additional duties upon the railroad company was thought by Congress to be a measure tending to secure speedy completion of the road.

But assuming, for the sake of the argument, that this express provision in case of failure does not preclude the right of forfeiture for breach of condition subsequent we are brought face to face with the extent of the power of the United States in that behalf.

In Schulenberg *vs.* Harriman (21 Wall., 44, 63) the law was declared as follows:

> "And it is settled law that no one can take advantage of the non-performance of a condition subsequently annexed to an estate in fee but the grantor or his heirs or the successors of the grantor if the grant proceed from an artificial person; *and if they do not see fit to assert their right to enforce a forfeiture on that ground the title remains unimpaired in the grantee.* The authorities on this point, with hardly an exception, are all one way from the Year Books down; and the same doctrine obtains where the grant upon condition proceeds from the Government. No individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.
>
> "In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition,

> such as an act directing the possession and appropriation of the property or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office-found was necessary to determine the estate, but, as said by this Court in a late case, 'the mode of asserting or resuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation or by taking possession directly under the authority of the Government without these preliminary proceedings.' *In the present case no action has been taken either by legislative or judicial proceedings to enforce a forfeiture of the estate granted by the acts of* 1856 *and* 1864. *The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections.*"

There is no suggestion here nor is there in any adjudicated case that the right to forfeit and resume the grant includes in it any other right or power.

Indeed the right of forfeiture is one which must always be exercised with strictness, and any act done inconsistent therewith is construed to be a waiver.

In Jones *vs.* Carter (15 Meeson and Welsby, 718) it was laid down that for violation of the covenants of a lease the landlord had the option of declaring the lease invalid:

> "On the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end the lease must be determined. In the cases above referred to the option was held to have been exercised by the receipt of rent subsequently due and the lease thereby rendered valid. In like manner the lease would be rendered invalid by some unequivocal act indicating the intention of the lessor to avail himself of the option given to him and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease, and if once rendered void it could not again be set up."

So a distress for rent is a waiver, as in itself it asserts a continuance of the relation by landlord and tenant; so also for the landlord to stand by and see improvements made.

In Croft *vs.* Lumley (6 House of Lords, 705) Bramwell, B., says:

> "The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry he may elect to avoid or not to avoid the lease, and he may do so by deed or by word." * * * "In strictness, therefore, the question in such cases is, Has the lessor, having notice of the breach, elected not to avoid the lease? Or has he elected to avoid it? Or has he made no election?"

It will thus be seen that on and after the 3d March, 1876, the United States had their *election* to declare the grant forfeited and to resume it, and that, failing to resume, the rights of our assignor remained unimpaired.

The right to impose this additional burden is to be sustained, according to the Attorney General, because it inheres in the right to forfeit; but how can one right be involved in another when the exercise of the one is inconsistent with the other? Certainly had the proviso of the act of 1876 treated with the Vicksburg, Baton Rouge and New Orleans Railway Company alone it would have been regarded by the courts as a distinct announcement that the United States had elected not to avoid the grant, if, indeed, the power of changing the terms and conditions reposed in them.

If this legislation were valid because based upon failure to comply with the condition subsequent of the grant it constituted a waiver of the forfeiture, and as it was unaccompanied by any new designation of time for completion it resulted in an indefinite extension of the time. That Congress regarded its right of forfeiture as unimpaired by the proviso in the act of 1876 is manifest from the act of Febru-

ary 2, 1887 (24 St., 391), by which all the granted lands east of the Mississippi and all granted lands west of the Mississippi coterminous with so much of the road as was completed January 5, 1881, were forfeited.

In the case of The Northern Pacific R. R. Co. *vs.* Traill County, *supra*, it was suggested by the court that there was eminent justice in requiring the railroad companies to pay the costs of survey. It is respectfully submitted that in our case the justice of such a requirement was no greater in 1876 than in 1871. No possible connection can be shown between the costs of survey and the failure of the company to build within the required time. The statutes relating to the public lands and the uniform policy of the country have been to retain the control of the surveys and to make them at the public expense. When the act of 1871 was passed the question of expense of surveying had been before Congress on two occasions—in 1864, when the costs of survey were imposed on the Union Pacific, Central Pacific, and Denver Pacific, and in 1870, when they were imposed on the Northern Pacific. It was, therefore, through no inadvertence that among the conditions of the grant a provision requiring the grantees to pay the costs of survey was not to be found, and the attempt to do so in 1876, if such be the meaning of the statute, was nothing more nor less than the effort of one of the parties to a contract to change its terms.

III.

But if the proviso were retroactive in its application it is contended by the appellant that its assignor, within the language, "was exempted by law from the payment of such cost." In demanding from the Union, Central, Denver, and Northern Pacific Companies the cost of survey no exception or reservation was made, and, whether exempt from such cost or not, the demand was without qualification.' Here Congress was merely endeavoring to fix the time when the

costs should be paid, if the companies were liable therefor; *not to create an obligation which did not already exist.*

And this is apparent from the legislative history of the proviso.

The legislative history of the clause is as follows:

When the sundry civil bill left the House of Representatives the proviso was as follows:

> "*And provided further*, That before any land granted to any railroad company by the United States shall be conveyed to such company, or any persons entitled thereto, under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, or persons in interest."

In the Senate it was amended by the insertion of the words:

> "*When such company is required by its act of incorporation to pay said cost.*"

So that it read:

> "*And provided further*, That before any land granted to any railroad company by the United States shall be conveyed to such company or any persons entitled thereto under any of the acts incorporating or relating to said company, *when such company is required by its act of incorporation to pay said cost*, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, or persons in interest."

To this amendment the House disagreed, and the conference committee reported to the two Houses the proviso with these words stricken out:

> "*When such company is required by its act of incorporation to pay said cost.*"

And substituting therefor the words:

> "*Unless such company is exempted by law from the payment of such cost.*"

And the section then read:

> "*And provided further*, That before any land granted to any railroad company by the United States shall be conveyed to such company, or any persons entitled thereto, under any of the acts incorporating or relating to said company, *unless such company is exempted by law from the payment of such cost*, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, or persons in interest."

The report of the conference committee was adopted by both Houses, and as thus amended the bill became a law.

The exemption by reason of enumeration was just as complete, just as much an exemption by law, as if it had been expressed, and unless the words "exempt by law" in the proviso are to be construed in favor of implied exemption they become absolutely meaningless, for no company had been expressly exempted, and full force is not given to every word in the statute.

By section 12 of the Texas Pacific act the contract was that "whenever the company shall complete a section of 20 miles it *shall* be the duty of the Secretary of the Interior to cause patents to be issued."

By the original grant the company, on completion of its road, was entitled to a patent without paying costs of surveying. Such was the contract. It was an *express* contract to that effect, because all the conditions which the company was to perform to entitle it to the patents were stated, and the payment of the costs of survey was not among them.

But the result is the same if the exemption from the payment of the costs of survey be treated as an *implication* from the language used in the twelfth section.

It was laid down by the Supreme Court in United States against Babbit (1 Black, 61) that what is implied in a statute or contract is as much a part of it as what is expressed, and this rule has never been questioned. (Wilson *vs.* National Bank, 103 U. S., 770.)

The company was, therefore, in and by the very act making the grant and prescribing the terms and conditions thereof, "exempted by law from the payment of the cost of surveying."

IV.

The proviso in question is found in the act making appropriations for sundry civil expenses for the fiscal year ending June 30, 1877, under the head of surveys of the public lands. (19 Stats., 221.)

There is, first, a distinct appropriation of $300,000 for survey of public lands and private land claims; then a proviso that it shall be expended under the direction of the Commissioner of the General Land Office, with the approval of the Secretary of the Interior; then a proviso limiting the expenditure to certain classes of surveys; then an appropriation of $25,000 for survey of private land claims, and an enactment that an account shall be kept of the cost of surveying and plotting every private land claim, and that the cost thereof shall be reimbursed by the claimant, and then follows the proviso now before the Court.

When dealing with private land claims general enactment was the method, and when treating of grants to railroads the vehicle is by proviso, just as is the direction as to who should expend the money and as is the limitations on the classes of surveys.

Clearly the Legislature at the time had in mind lands for the survey of which the appropriation might be used, and the object of the proviso was to require prepayment by the railroad companies of the costs of survey of any lands for which appropriation was then being made. (U. S. *vs.* Dickson, 15 Pet., 165; Ryan *vs.* Carter, 93 U. S., 78.)

Without going into the questions discussed in points I, II, and III, *supra*, it has always seemed to us that there was one plain and decisive ground of judgment, which is that in the proviso in question (19 Stats., 221), considering the context, viz., the disposition of an appropriation for the survey of public lands thereafter to be made, and that all laws are to have only a *prospective* operation unless the contrary clearly appears, the purpose of Congress was that as to any *future* cost of surveying—that is, cost for that purpose incurred by the United States after the proviso went into effect—such cost was to be paid before the United States should convey or patent the lands, unless the company was exempted by law from such payment. We ask the Court to lay the act of 1871 making the grant of lands side by side with the proviso in question, and, remembering that the lands granted to the appellant's assignor had been surveyed and the costs thereof paid by the United States years before the grant of 1871 was made and before the proviso was enacted, and then decide whether there is any fair intendment that Congress, in this proviso, intended to make it retroact and embrace such a case as that of the appellant company, even if it had the constitutional power to do so.

Whatever may be the power of Congress in the matter, we submit that the proviso manifests no intent to make a retrospective provision for a case where the surveys had been made and the cost thereof paid by the United States before it made the grant of lands, which grant gave the right thereto without paying the cost of surveying. If there were no other question in the case we should rely upon the above proposition with unshaken confidence in its soundness.

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Attorneys for Appellant.

JAN 6 1888
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 575.

NEW ORLEANS PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

A. H. GARLAND,
Attorney General.
ROBERT A. HOWARD
Assistant Attorney General.

Judd & Detweiler, Printers.

brought to recover the money so paid. The appellant's case in brief is as follows:

It is a corporation of the State of Louisiana, and became the owner, by conveyance executed January 5, 1881, of all the right, title, and interest of the New Orleans, Baton Rouge and Vicksburg Railroad Company in and to the grant of lands made by the twenty-second section of the act of Congress approved March 3, 1871 (16 Statutes, 579). Subsequently to this conveyance appellant constructed 260 miles of road over the route indicated by maps filed by the New Orleans, Baton Rouge and Vicksburg railroad in the Department of the Interior in 1871 and 1873.

On the 13th of March, 1883, the Secretary of the Interior transmitted to the President of the United States two reports in writing of the commissioner duly appointed by the President to examine appellant's line of road built as aforesaid, and recommended that 260 miles be accepted and that patents for such lands as might have been earned by this construction be issued to appellant. The President, on the 16th of March, 1883, approved this recommendation, and on the 3d of March, 1885, patents were issued to the appellant for 679,284.64 acres of land in the State of Louisiana. Before issuing said patents the Secretary of the Interior exacted from appellant the aforesaid sum of money for costs of survey of said lands. The case was argued on demurrer filed by the appellee before the Court of Claims, and, the demurrer having been sustained and the judgment of said Court having been passed dismissing the petition, the appellant, on the 9th of June, 1886, filed its petition praying an appeal to the Supreme Court of the United States.

It is contended that the Court of Claims was right in sustaining the demurrer.

The twenty-second section of the act of March 3, 1871, under which the appellant claims, is as follows:

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company shall have, and, in aid of its construction from New Orleans to Baton Rouge, thence, by way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by this act granted, in the State of California, to said Texas Pacific Railroad Company:" * * * "Provided, That said company shall complete the whole of said road within five years from the passage of this act."

16 Stat., 579.

Among other things, the act of July 31, 1876, provides—

"And provided further, That, before any land granted to any railroad by the United States shall be conveyed to such company or to any persons entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying the same by the said company or persons in interest."

19 Stat., 121.

There is but one question presented for the consideration of the Court—whether this railroad company was exempted

from the payment of the costs of survey by the terms of the act of March 3, 1871, and whether the failure to comply with the limitation of that act granting the franchise, within which the road should be completed, to wit, the term of five years, worked a forfeiture of the grant.

Nothing was done under the original grant by the company therein named except to file in the Interior Department a map showing the general line of its proposed route. In 1881 all its rights were sold to the appellant. After this transfer the work on the road was commenced by the appellant, who constructed 260 miles of the road. At the time of the passage of the act of 1876 the five years within which the road was required to be built had passed. The road, so far from having been completed, was not begun. In this condition of affairs Congress passed the act of July 31, 1876, by which a forfeiture of the franchise originally granted to the New Orleans, Baton Rouge and Vicksburg road was exercised. Did the passage of this act interfere with the rights created by the original act, or was it in the nature of an imposition of new conditions upon the grant therein made? Certainly Congress could, by legislation, assert an inherent right in the public domain upon the lapse of a condition precedent to its enjoyment and use. It did not require any judicial proceeding to assert this right, but Congress had the power to pass any act that was inconsistent with the original grant, and the passage of such act amounted to a forfeiture. Certainly the right to declare a forfeiture included the power to impose new conditions.

This principle is asserted in the case of Farnsworth *et al. vs.* Minnesota and Pacific Railroad Company, 92 U. S., 49,

50. Was this road exempt from the payment of such costs of survey? It is conceded that there is no express exemption, but it is contended that an exemption arises from the fact that no such condition is imposed by the language of the original act by the terms of which it is alleged the rights of the parties became fixed. This might have force if the grantees in this act had earned their rights; but they had signally failed to do so. Not only had the whole road remained incomplete, but no part of it had been even commenced within the time limited for its entire construction. Surely if Congress, in 1876, had the power to withdraw the grant upon failure of the company to commence the building of the road, it had the power to impose new conditions upon the continuance of the grant. It was ten years after the conditional grant had been made and five years after the time limited for the construction of the road and four and a half years after the new condition imposed by the act of 1876 that the appellant, with a full knowledge of the act aforesaid, bought out the grantees and commenced the work.

This grant is clearly within the terms of the act of 1876.

Grants that exempted the grantee from paying such costs of survey are confessedly not within its provisions.

Grants that expressly required the grantees to pay such costs are not affected by it.

The only remaining class are grants like this, where no express provision of exemption is made.

It is, therefore, submitted that the action of the Court of Claims in sustaining the demurrer was in every particular